No. 80-1047

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In the Supreme Court of the United States

JANUARY TERM, 1981

GEORGIA POWER COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is obligated to pay just compensation to an electric utility when hazards stemming from navigation of privately owned sailboats on an Army Corps of Engineers reservoir induce the utility to raise the height of power lines traversing the reservoir.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-12a) is reported at 633 F. 2d 554.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1980. A petition for rehearing was denied on October 3, 1980 (Pet. App. 1b). The petition for a writ of certiorari was filed on December 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

The Clark Hill Reservoir was constructed as part of a project in the Savannah River Basin authorized by Congress in 1944; a project report approved by Congress in 1946 indicated that it was to serve multiple purposes, including the production of hydroelectric power and the improvement of navigation (Pet. App. 2a n.1). The project was planned and operated by the Army Corps of Engineers; and recreational uses, including boating, were part of the master plan published in September 1950 (Exh. M).

Petitioner owned an electrical power transmission line traversing lands to be condemned for the project. Following discussions with the Corps in 1950 and 1951, petitioner entered into an agreement with the Corps, on February 26, 1951, providing for relocation of the line. The easement then traversed by the power line was conveyed to the United States; the United States, in exchange, provided an easement over other portions of the project and paid petitioner $232,800 for the cost of moving the line (Pet. App. 4a, 6a). The agreement contained a "hold harmless" clause relieving the United States of any liability in connection with the construction and operation of the power line at its new location (Exh. I).

The February 1951 agreement contemplated execution of an easement agreement, and such an agreement was entered into by petitioner and the United States on December 7, 1951 (Pet. App. 4a). This latter agreement granted petitioner an easement "for the construction, operation and maintenance of an electrical transmission line" over the project area; the easement was subject to a number of conditions, including (1) a clause relieving the United States of any liability for personal injuries or property damage incident to the construction, maintenance, or use of the line; (2) a clause requiring petitioner to inspect the line periodically and, at its own expense, keep it free of defects; and (3) a clause providing that use and occupation of the lands over which the easement was granted were to be subject to rules and regulations promulgated by the District Engineer of the Corps of Engineers with regard to public safety and other matters (Pet. App. 7a).

Neither the February 1951 agreement nor the December 1951 agreement specified the height at which the line was to be built (Pet. 3). Petitioner constructed the new line at the height of 25 feet above the reservoir, a height consistent with the National Electric Safety Code. This height was chosen with the acquiescence of the Corps, although not at its command (Pet. 3; Pet. App. 6a-7a & n.6).

The Corps did not, at the time of the 1950-1951 negotiations, regulate the height of the masts or antennas on sailboats that might use the reservoir nor has it since promulgated any such height restrictions (Pet. App. 6a). In recent years, boats with masts or antennas exceeding 25 feet have sailed on the reservoir. A near collision with the power line occurred in 1971, and in 1973 a passenger in a sailboat was killed when the boat's mast struck the power line (*id.* at 2a). Following the 1971 incident, the Corps of Engineers asked petitioner to consider raising the power line; petitioner at that time declined to do so unless the United States would

underwrite the expense (Pet. 4). The Corps did not then, or at any time thereafter, order petitioner to move its line (Pet. App. 9a). The Corps took precautionary action on its own, posting buoys and signs and marking navigational maps to warn of the hazard to boats, although the line did not cross any of the main navigation channels (*id.* at 8a).

On February 24, 1977, the Corps formally advised petitioner that the United States would not bear the cost of raising the power line (Exh. AA). Later that year petitioner raised the line to a height of 54 feet; and on November 4, 1977, filed its petition in the Court of Claims seeking reimbursement of the cost of raising the line (Pet. App. 2a; Pet. 8). It asserted that the failure of the Corps of Engineers to issue regulations prohibiting use of the reservoir by boats with masts or antennas exceeding 25 feet in height constituted a taking of its power line easement within the meaning of the Fifth Amendment of the Constitution and entitled it to just compensation (Pet. App. 1a-2a).

The Court of Claims, granting summary judgment in favor of the United States, dismissed the petition (Pet. App. 12a). It held that there was no taking because the events that induced petitioner to raise it power line were the actions of independent third parties—the sailboat owners—not of the government (*id.* at 4a-6a). The court noted (*id.* at 8a-9a) that the warnings posted by the Corps made sailing in the area of the line an action that exceeded any authority granted by the government to sail on the reservoir. The court construed the 1951 easement agreement as placing on petitioner the risk of the line's becoming a hazard and the attendant expense of alleviating any such hazardous condition (*id.* at 7a-8a). It found no obligation on the part of the government to alter its original regulatory scheme so as to ban boats with given mast or antenna heights from the reservoir (*id.* at 9a-10a).

ARGUMENT

The decision of the Court of Claims is correct and conflicts with no decision of this Court or of any court of appeals. It is, moreover, of limited significance, turning largely on the construction of the terms of a particular contract. It accordingly does not warrant review by this Court.

1. The determination of whether government action constitutes a "taking" for purposes of the Fifth Amendment depends on an "essentially ad hoc" examination of the facts in the particular case. *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 124 (1978). One factor of crucial importance to this inquiry is whether the government action has interfered with "distinct investment-backed expectations." *Ibid.*

Given the terms of the two agreements involved here, petitioner cannot have had either distinct or reasonable expectations that a change of circumstances making its power line possibly hazardous at a height of 25 feet would cast upon the United States the obligation of paying for whatever alterations were necessary to make the line safe. Petitioner assumed all tort liability in connection with the line and the duty of inspecting it and keeping it free of defects. The agreement did not specify 25 feet as a height at which the line could safely be maintained in perpetuum and did not guarantee that the types of boats used for recreational sailing would never change or that the Corps, contrary to its policy at the time the agreements were negotiated, would begin specifying maximum heights for antennas and masts on boats using the lake. In sum, the risk of making a judgment about the power line's optimum height that would prove erroneous in the long term was petitioner's.

The easement agreement did provide, however, that petitioner's easement would be subordinated to the requirements of navigation, especially those relating to safety (see page 2, *supra*). This Court in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), made clear the significance of such a condition. It held that the government, after allowing the owners of a pond to dredge and improve the property in connection with a project linking the pond to navigable waters, was required to compensate the owners if it sought to create a right of public access to the improved pond; but the Court noted (444 U.S. at 179) that the result would have been different had the government "conditioned its approval of the dredging on petitioner's agreement to comply with various measures that it deemed appropriate for the promotion of navigation." Thus, under the terms of the agreement and settled law, the United States retained the power to regulate the height of the line as the needs of navigational safety dictated, and such regulation, if rationally related to those needs, would not constitute a taking.

2. As the Court of Claims correctly found, however (Pet. App. 9a), the United States never did exercise this regulatory option to require petitioner to move its line. Rather, by placing buoys and warning signs and by marking the hazard on navigational maps, the Corps of Engineers made it clear to those who sailed on the reservoir that venturing out of the main navigation channels into the areas crossed by the line was unauthorized and hazardous.[1] Petitioner was

[1]Because the government not only did not affirmatively authorize the sailing of high-masted boats in the areas crossed by petitioner's power line but expressly warned against such action, this case is unlike *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), on which petitioner heavily relies (Pet. 12, 16, 22-23). In *Griggs*, the county actually leased the easements in question to various airlines for landings and take-offs (369 U.S. at 86), and the use of those easements by airplanes destroyed nearby homeowners' quiet enjoyment of their property.

United States v. *Causby*, 328 U.S. 256 (1946), on which petitioner also relies (Pet. 17-18), involved low overflights by military airplanes

impelled to move its line because of its concern about the actions of private boaters who might disobey the government's warnings, not because of any government command that petitioner relocate the line.

Thus, as the Court of Claims held (Pet. App. 4a-6a), even assuming that petitioner had a vested right, as against direct interference by the government, to maintenance of its line at a height of 25 feet, it had no right to recover compensation in these circumstances, where the interference came from third parties. See *Miller* v. *United States,* 583 F. 2d 857, 864-865 (6th Cir. 1978) (United States not responsible for flooding of property resulting from operation of dams and locks owned by Canada, even though the United States, through treaties, allowed Canada to build the structures); *Minot* v. *United States,* 546 F. 2d 378, 381 (Ct. Cl. 1976) (United States incurred no Fifth Amendment liability when a local power authority, acting pursuant to an irrevocable permit from the United States, erected a power line on an easement of the United States crossing private lands).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and is therefore distinguishable because it was a case of the government itself making use of other persons' property. See *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 128.

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